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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NOS. 78-432, 78-435, 78-436

UNITED STEELWORKERS OF AMERICA,
AFL-CIO-CLC, *Petitioner,*

v.

BRIAN F. WEBER, KAISER ALUMINUM & CHEMICAL CORPORATION, and UNITED STATES OF AMERICA,
Respondents.

KAISER ALUMINUM & CHEMICAL CORPORATION, *Petitioner*

v.

BRIAN F. WEBER, *Respondent*

UNITED STATES OF AMERICA and
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Petitioners*

v.

BRIAN F. WEBER, ET AL., *Respondents*

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF THE GOVERNMENT CONTRACT EMPLOYERS ASSOCIATION AS AMICUS CURIAE

GERARD C. SMETANA
ROOKS, PITTS, FULLAGAR AND POUST
208 South LaSalle Street
Chicago, Illinois 60604
Attorney for the Amicus Curiae

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Pursuant to Supreme Court Rule 42(3), the Government Contract Employers Association (GCEA) moves the Court for leave to participate as *amicus curiae* and file the attached brief

as *amicus curiae* in the above-entitled cause requesting that a Writ of Certiorari[1] be granted, and in support thereof states as follows:

1. Consent to the filing of a brief in this cause by the Government Contract Employers Association, as *amicus curiae,* was obtained from respondent, Brian F. Weber, and petitioners United States of America, and United Steelworkers of America, but was refused by petitioner, Kaiser Aluminum & Chemical Corporation.

2. The applicant, Government Contract Employers Association has an interest in this case in that:

(a) The GCEA is a not-for-profit association of employers doing business nationwide who contract with the Government. All GCEA members are subject to Executive Order 11246 (30 Fed. Reg. 12319 (1965), as amended by 32 Fed. Reg. 14302 (1967), and 43 Fed. Reg. 46501 (1978).). The members of GCEA are each obligated to follow the affirmative action and non-discrimination requirements of Executive Order 11246 as well as Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e *et seq.*) (hereafter "Title VII").

(b) The GCEA was formed to assist employers in resolving the tensions caused by the conflict between the regulations promulgated under Executive Order

[1] The GCEA supports the petition of the Government only to the extent that it urges the granting of the writ of certiorari. It opposes that petition insofar as it requests the Court to remand the case to the district court. If the writ of certiorari is granted, the GCEA will largely support the position of respondent Weber, and assist the Court in resolving the tension between the impermissible quotas under the OFCCP regulations and § 703(j) of Title VII.

11246 and the court decisions interpreting Title VII. The principal concern of GCEA is to present the views of its members in examining, implementing, following, and where necessary challenging the correctness of regulations, orders, and laws designed to promote equal employment opportunity for all employees.

(c) The decision of the Fifth Circuit Court of Appeals below creates serious problems for members of GCEA in complying with the conflicting interpretation and requirements of Title VII and Executive Order 11246. Members of GCEA are placed in the untenable position of attempting to follow the regulations of a government agency which in fact subjects them to private class actions by persons who may have been discriminated against because of this government mandated action.

(d) The GCEA represents a point of view of government contractors that is not being presented to the Court by any party or any other employer's association. Thus GCEA will be the only voice for government contractors in pointing out to the Court the conflict between the regulations promulgated by the Office of Federal Contract Compliance Programs (OFCCP) and Title VII.[2]

(e) The GCEA is uniquely suited to bring the Court's attention to the practices and procedures under which government contractors have been

[2] Although respondent Weber has an interest in supporting the decision of the Fifth Circuit Court of Appeals, he has no overriding interest in establishing that the OFCCP regulations require employers to engage in illegal conduct under Title VII.

required to institute illegal quotas notwithstanding the government's disavowal that its requirements are in fact quotas.[3]

3. The applicant believes that the following relevant questions of law and analysis thereof may not otherwise be presented to the Court:

(a) While employers may engage in "affirmative action" in part to make a personal contribution to resolving what is surely one of the nation's most compelling economic and social problems, frequently such action is produced by a prudent response to one or more of the following factors:

(i) The requirement that Federal contractors commit themselves to "goals and timetables" for increasing their employment of minorities in those job categories in which they are being "underutilized," 41 C.F.R. §§ 60-2.10, 2.12; *Contractors Ass'n of Eastern Pennsylvania* v. *Secretary of Labor,* 442 F.2d 159 (3d Cir.), *cert. denied,* 404 U.S. 854 (1971), and the commitments to hire and/or promote minorities according to a prescribed ratio which government agencies insist upon in order to resolve issues of employment discrimination.

(ii) The burden of disproving discrimination which courts impose when presented with statistics showing a disproportionately low employment of minorities, *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 805 n. 19 (1973).

[3] Counsel for GCEA likewise presented the argument to the Court as *amicus curiae* for Chamber of Commerce of the United States of America in *McDonald* v. *Santa Fe Trail Transportation Co.,* 427 U.S. 273 (1976), urging the correctness of a reverse discrimination cause of action.

(b) As the result of such considerations, many employers have now adopted "affirmative action" programs and are giving special consideration to race, sex, and ethnic background in their employment decisions. They are doing so because of the mandates of OFCCP. Employers engaging in affirmative action programs are of course aware—and concerned—that some of these government mandated actions may constitute discrimination in reverse.

(c) It is the position of GCEA that the regulations promulgated by OFCCP in fact create quotas which are violative of Title VII and contrary to the Executive Order itself. The fact that a finding of noncompliance is made by the OFCCP without taking into consideration why a numerical imbalance in the workforce is not the result of discrimination is contrary to the standards articulated by the Court in *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973), *Furnco Construction Company* v. *Waters,* ____ U.S. ____, 98 S. Ct. 2943 (1978), and *Board of Trustees of Keene State College* v. *Sweeney,* ____U.S. ____, No. 77-1792, decided November 13, 1978.

(d) This Court's decision in *Regents of the University of California* v. *Bakke,* ____U.S.____, 98 S. Ct. 2733 (1978), which held that a university can consider race as one factor in its admissions decisions, has left employers uncertain as to the role that racial considerations can take in the employment area.

4. Applicant is aware that this motion is late in being presented to the Court. It respectfully requests that the Court excuse this lateness however, because applicant was following the briefing schedule extended to November 13, 1978 which was granted to respondent Weber by the Court

on October 4, 1978. As we support the position of Weber, we planned to file the instant motion and brief *amicus curiae* immediately following Weber's response. The applicant has not examined or responded to any reply briefs which may have been filed with the Court.

5. In light of the substantial impact on American employers which the Court's decision in this case inevitably will have, and the complexity of the issues involved, the Government Contract Employers Association urges the Court to grant its Motion.

Wherefore, it is respectfully submitted that the Court grant leave for the Government Contract Employers Association to participate as *amicus curiae* and file the attached brief, as *amicus curiae,* in this case.

Dated this 17th day of November, 1978.

GERARD C. SMETANA
ROOKS, PITTS, FULLAGAR AND POUST
Suite 1776
208 South LaSalle Street
Chicago, Illinois 60604
Attorney for the Applicant

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BRIEF OF THE GOVERNMENT CONTRACT EMPLOYERS ASSOCIATION AS *AMICUS CURIAE*

INTEREST OF THE *AMICUS CURIAE*

The Government Contract Employers Association ("GCEA") respectfully submits this brief *amicus curiae* in support of the petitions of Kaiser Aluminum & Chemical Corporation, United Steelworkers of America, the United States of America, and the position of Brian Weber in the alternative, that the Court grant a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit in the above entitled case.[1] GCEA respectfully submits that the issue to be decided in this case is whether racial quotas can be imposed not to remedy past discrimination by an employer, or to assist identifiable victims of past discrimination, but rather to achieve a designated ratio of minority employees presumed to have been victims of societal discrimination.

The GCEA is a not-for-profit association of employers doing business nationwide who contract with the government. All GCEA members are subject to Executive Order 11246 (30 Fed. Reg. 12319 (1965), as amended by 32 Fed. Reg. 14302 (1967), and 43 Fed. Reg. 46501 (1978)). The members of GCEA are each obligated to follow the affirmative action and non-discrimination requirements of Executive Order 11246 as well as Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e *et seq.*) (hereafter "Title VII"). The GCEA was formed to assist employers in resolving the tensions caused by the conflict between the regulations promulgated under Executive Order 11246 and the court decisions interpreting Title VII. The principal concern of GCEA is to present the views of its members in examining, implementing, following, and where

[1] The GCEA supports the petition of the United States only to the extent that it urges the granting of the writ of certiorari. It opposes that petition insofar as it requests the Court to remand the case to the district court. If the writ of certiorari is granted, the GCEA will largely support the position of respondent Weber, and assist the Court in resolving the tension between the impermissible quotas under the OFCCP regulations and § 703(j) of Title VII.

necessary, challenging the correctness of regulations, orders, and laws designed to promote equal employment opportunity for all employees.

The GCEA represents a point of view of government contractors that is not being presented to the Court by any other employer association; the members of GCEA will be directly affected by the outcome of the instant case.[2] The decision of the Fifth Circuit below creates serious problems for members of GCEA in complying with the conflicting interpretation and requirements of Title VII and Executive Order 11246. Members of GCEA are placed in the untenable position of attempting to follow the regulations of a government agency which in fact subjects them to private class actions by persons who may have been discriminated against because of this government mandated action.

It is the position of GCEA that the regulations promulgated by OFCCP in fact create quotas which are violative of Title VII and contrary to the Executive Order itself. The fact that a finding of noncompliance is made by the OFCCP without taking into consideration why a numerical imbalance in the workforce is not the result of discrimination is contrary to the standards articulated by the Court in *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973), *Furnco Construction Company* v. *Waters,* ____U.S.____, 98 S. Ct. 2943 (1978), and *Board of Trustees of Keene State College* v. *Sweeney,* ____ U.S.____, No. 77-1792, decided November 13, 1978.

Because the members of GCEA are subject to the conflicting demands of inconsistent government mandates, the GCEA urges the Court to grant the petitions herein. Review of this

[2] Any change in the obligations of government contractors could have an adverse effect on their current affirmative action requirements. The GCEA thus will urge that any change in these obligations, and any liability arising therefrom, be prospective only. *City of Los Angeles* v. *Manhart,* ____ U.S. ____, 46 U.S.L.W. 4347 (1978).

case will allow the Court to begin the process of reconciling the regulations of the Department of Labor with Title VII, and to provide guidance to employers concerning the appropriate scope of affirmative action.

STATEMENT OF THE CASE

In February 1974, Kaiser Aluminum & Chemical Corporation ("Kaiser") and the United Steelworkers of America ("USWA") entered into a collective bargaining agreement which created a program for eligibility to receive on-the-job training to enter craft positions at Kaiser's plants. For purposes of the training program a two-tracked seniority list, based upon race, was created. The program provided an entrance ratio of one white to one minority worker until the percentage of minority craft workers roughly approximated the percentage of minority population in the surrounding area of each plant. Eligibility into the program was based on seniority within the respective racial groupings. Kaiser adopted the fifty percent (50%) quota in its training program in part because of its perception of the requirements under Executive Order 11246 as interpreted by the Office of Federal Contract Compliance Programs ("OFCCP").[3] The effect of this system was to admit minority workers into the training program who had less overall seniority than some white applicants.

Brian Weber, an unsuccessful white bidder working at the Gramercy, Louisiana plant brought a class action to challenge the legality of the training program.[4] Weber alleged that by preferring black employees with less seniority for admission to the program, Kaiser and USWA violated Title VII.[5]

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[3] Opinion of the Court of Appeals, 563 F.2d 216, 218 (5th Cir. 1977). Judge Wisdom dissented from the decision. The opinion of the district court is reported at 415 F. Supp. 761 (E.D. La. 1976).

[4] 415 F.Supp. at 763.

[5] Civil Rights Act of 1964, §§701 *et seq.*, 42 U.S.C. §§2000e *et seq.*

The district court found that the program was not instituted to correct any past discrimination by Kaiser.[6] Because Kaiser did not discriminate in filling its craft positions in the past, the court held that the two-track training program was unlawful discrimination under Title VII. The court rejected the assertion that the racial quotas were a legitimate response to societal discrimination. Moreover, no one contended, and the district court found that none of the minority workers preferred over the more senior white workers was ever a victim of discrimination at the Gramercy plant.[7]

The majority of the Fifth Circuit Court of Appeals affirmed the district court. It found that "[in] the absence of prior discrimination a racial quota loses its character as an equitable *remedy* and must be banned as an unlawful racial preference prohibited by Title VII, § 703(a) and (d)."[8]

With regard to the defense that Executive Order 11246 required the implementation of the race-based selection procedure, the court found "if Executive Order 11246 mandates a racial quota for admission to on-the-job training by Kaiser in the absence of any prior hiring or promotion discrimination the Executive Order must fall before this direct congressional prohibition."[9]

REASONS FOR GRANTING THE WRIT

I. This Case Presents Important Questions Concerning The Permissible Scope of Voluntarily Instituted Racial Quotas In The Employment Area Which Remain Unresolved Under The Court's Decision In *Bakke*.

The *Weber* case squarely presents the problems relating to the legality of the use of racial preferences in order to remedy past societal discrimination. In the instant case, the Fifth

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[6] 415 F.Supp. at 765.

[7] *Id* at 764.

[8] 563 F.2d at 224.

[9] *Id.* at 227.

Circuit found that any voluntary compliance with Executive Order 11246 which includes race-conscious selection procedures violates Title VII, unless employers or others are prepared to establish that the employer engaged in past discriminatory acts. The recent decision of this Court in *Regents of the University of California* v. *Bakke,*[10] (hereafter "*Bakke*") answered some of these questions in the context of univeristy admissions. It did not answer these questions in the employment area.

The impact of *Bakke* in employment is speculative at best for two reasons. First, the ambiguity of legislative intent under Title VI which four members of the Court in *Bakke* found sufficient to allow for remedial action to correct societal discrimination in that case is not present under Title VII. Second, the compelling state interest which Mr. Justice Powell found in *Bakke* is not present in the employment area where there is no state action, and thus the constraints of the Fourteenth Amendment are not present. *Weber* is the paradigm case to resolve these issues in employment which are left unanswered by *Bakke.*

A. The Ambiguity Of Legislative Intent Under Title VI Is Not Present Under Title VII.

In *Bakke,* an unsuccessful white applicant challenged the special admissions program of the University of California at Davis, which was designed to assure the admission of a specified number of students from certain minority groups. The Court held that state university admissions policies which are based on fixed racial quotas are illegal.

Two major issues were decided in *Bakke.* First, membership in a racial or ethnic minority does not constitutionally justify preferential treatment by the state or federal government. Second, race can be considered as one factor in giving preferential treatment if the reason for the consideration is constitutionally justifiable.[11]

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[10] ____ U.S. ____, 98 S.Ct. 2733 (1978).

[11] Kurland, *Bakke's Wake,* 60 Chi. B. Rec. 66, 82 (1978).

The opinion of Justices Brennan, White, Marshall and Blackmun found that the school's exclusion of whites from consideration for a certain number of positions in order to rectify societal discrimination against minorities was lawful.[12] The opinion by Mr. Justice Stevens, joined by Justices Stewart, Rehnquist and Chief Justice Burger, found that any use of racial classification is strictly forbidden by the language of Title VI.[13] Mr. Justice Powell agreed with the Stevens' position that any classification based on race is subject to strict judicial scrutiny. He found that the strict scrutiny test could be met by the state's compelling interest in protecting the university's First Amendment right to establish a diverse student body. Since the university did not use the least restrictive means in satisfying this interest, however, Justice Powell found the admissions program unconstitutional.[14] Justices Brennan, White, Marshall and Blackmun decided the issues presented in *Bakke* under the statutory provisions of Title VI. *Bakke* did not answer the question of whether race-conscious considerations and quotas are appropriate under Title VII.

A majority of the Court found that Title VI is to be equated with the Fourteenth Amendment. "We agree with Mr. Justice Powell that, as applied to the case before us, Title VI goes no further in prohibiting the use of race than the Equal Protection Clause of the Fourteenth Amendment itself."[15] This judgment was supported in large part on the absence of

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[12] 98 S. Ct. at 2766.

[13] The substantive nondiscrimination provisions of Title VI are virtually identical to those of Title VII: No person in the United States shall on the grounds of race, color, or national origin be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. 42 U.S.C. § 2000d *et seq.*

[14] 98 S.Ct. at 2764.

[15] 98 S.Ct. at 2767, (Opinion of Justices Brennan, White, Marshall and Blackmun).

legislative history under Title VI which would prohibit preferential treatment of minorities in order to rectify past societal discrimination. This reasoning is inapposite when applied to Title VII because both the language and legislative history of Title VII forbid preferential treatment for any racial group.

During the course of the debates in enacting Title VII, grave concerns were raised that the Act, as proposed, would require employers to disadvantage whites in order to comply with the Title.[16] This objection was met by proponents of the Act, with the contention that no such treatment was intended. "[An employer] would not be obliged—or indeed, permitted—to fire whites in order to hire negroes, or to prefer negroes for future vacancies, or once negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier."[17] Despite these assurances, doubts as to the Act's intent persisted. Section 703(j) was inserted in the Act to alleviate these fears:

> Nothing contained in this subchapter shall be interpreted to require any employer . . . labor organization, or joint labor management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of their race, . . . on account of an imbalance which may exist with respect to the total number or percentage of persons of any race . . . in comparison with the total number or percentage of persons of such race, . . . in any community, state, section or other area, or in the available work force in any community, state, section, or other area.

42 U.S.C. § 2000e-2(j).

Senator Humphrey, one of the bill's drafters, commented on the purpose of § 703(j) as follows:

[16] *See eg.*, 110 Cong. Rec. 9881 (1964).
[17] 110 Cong. Rec. 7213 (1964).

> A new subsection 703(j) is added to deal with the problem of racial balance among employees. The proponents of this bill have carefully stated on numerous occasions that Title VII does not require an employer to achieve any sort of racial balance in his workforce by giving preferential treatment to any individual or group. Since doubts have persisted, subsection (j) is added to state this point expressly.

110 Cong. Rec. 12723 (1964).

Although § 703(j) is phrased so that an employer is not *required* to racially balance his workforce, the prohibition on a *voluntary* balance is equally applicable, at least insofar as such balancing will injure identifiable non-minority workers. In *McDonald* v. *Santa Fe Trail Transportation Company,* 427 U.S. 273 (1976), the Court made it clear that the protection of Title VII extends to whites on the same basis as minorities. Therefore, it is incongruous to read § 703(j) to allow voluntary racial preferences when to do so will give rise to a cause of action to an injured white worker under §§ 703(a)-(d).

Justices Brennan, White, Marshall and Blackmun found the legislative history of Title VI silent as to the propriety of remedying past societal discrimination under that provision. No such inference can be made under Title VII. The language of the Act, and the legislative history make it clear that preferential treatment for minorities in employment is strictly forbidden.

B. The Compelling State Interest Found In Bakke Is Absent in Weber.

In reaching the constitutional question in *Bakke,* Mr. Justice Powell found that the requirements of the Fourteenth Amendment mandated that any use of racial classifications is suspect and can only be overcome by a compelling state interest. The compelling interest which Mr. Justice Powell found in *Bakke* is the university's First Amendment right to

establish a diverse student body. No comparable right exists in the employment area. Kaiser, in its Petition for Certiorari, attempts to find compelling interests in two areas:

> (1) an interest in action "to ensure against" discrimination which is no less substantial than in remedying past discrimination and (2) an interest in action "to assure utilization of all segments of society and the available labor pool" comparable to the public school's interest in a diverse student body.[18]

At present, no compelling interest comparable to those enumerated above has been recognized by the Court. Whether such interests are indeed compelling and sufficient to satisfy the use of outright racial quotas in the employment context are issues which are vitally important to American industry and must be resolved by the Court.

Unlike *Bakke*, the present case presents no issue of state action. Rather, this case involves action taken by purely private parties not subject to any constitutional proscription against discrimination. The question thus presented is purely one of statutory interpretation. If however, the Court should find, in the context of this case, that Title VII must have the same meaning as the Fourteenth Amendment, a definition of the interests which can overcome strict judicial scrutiny for racial classifications is imperative.[19]

The *Weber* case affords the Court the opportunity to define the role of racial preferences in employment, for this case squarely presents important questions which are unresolved under *Bakke*.

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[18] Petition for Writ of Certiorari by Kaiser, No. 78-435 at 11.

[19] *Bakke* also left open the question of the propriety of instituting racial quotas in the absence of any finding of past discrimination. The opinion of Mr. Justice Powell frequently contrasted the factors in the *Bakke* case to those cases under Title VII where quotas were imposed to remedy specific findings of discrimination. However, no guidelines

(Footnote continued on following page.)

II. This Case Presents To The Court The Opportunity To Resolve The Conflicting Demands Placed Upon Industry In Conforming Its Equal Employment Opportunity Responsibilities Under Title VII And Executive Order 11246.

A decision in the instant case is necessary to reconcile government contractors' attempts to engage in "affirmative action" as required by Executive Order 11246, yet comply with the prohibitions of Title VII that no person shall be discriminated against in employment on the basis of race, sex, religion, or national origin. As the Executive Order is currently being interpreted by OFCCP, an employer must either choose to violate Title VII or forego government contracts. This case provides the Court the unique opportunity to define a unified national equal employment policy by reconciling the express congressional intent in Title VII to ban discrimination in employment with the executive policy of promoting affirmative action under Executive Order 11246.[20]

(Footnote continued from preceding page.)

were given regarding the use of such measures when no discrimination has been found, and the result of the voluntary quotas is to deprive white workers of employment opportunities in favor of minorities who have not been found to be victims of any past discrimination.

The propriety of the use of racial quotas to remedy specific findings of past discrimination has been assumed by the courts of appeal. *See e.g., United States* v. *International Union of Elevator Constructors, Local 5,* 538 F.2d 1012 (3d Cir. 1976); *EEOC* v. *Local 638,* 532 F.2d 821 (2d Cir. 1976); *NAACP v. Allen,* 493 F.2d 614 (5th Cir. 1974). The Supreme Court has never approved of such preferential treatment in the absence of such a finding.

[20] Executive Order 11246 is not facially contradictory with Title VII, rather the regulations promulgated thereunder create the conflict. See discussion, *infra.*

A. The Regulations Promulgated Under Executive Order 11246 Contravene The Express Prohibitions On Employment Discrimination Under Title VII.

The conflicting demands in Title VII and the regulations promulgated under Executive Order 11246 have placed government contractors in a quandary. On the one hand, Title VII flatly prohibits discrimination against any person because of his or her race. On the other hand, the regulations of the OFCCP, issued pursuant to Executive Order 11246 mandate that racial preferences be given to minorities regardless of any discrimination against them and despite its adverse effect upon non-minority workers.

1. The Compliance Requirements Under Executive Order 11246 Oblige Federal Contractors To Establish Racial Quotas.

The compliance requirements of OFCCP regulations under Executive Order 11246 oblige federal contractors to implement racial quotas in the guise of "goals and timetables" in order to maintain their government contracts. Indeed the court of appeals in the present case found that the one minority for one white entrant to the Kaiser craft training program was instituted to comply with the threats of the OFCCP conditioning federal contracts on appropriate affirmative action.[21] The court also correctly found that "attempts to distinguish a numerical goal from a quota have proved illusory and most such goals suggested by the OFCC can fairly be characterized as quotas." 563 F.2d at 222.

The soundness of the court's position is demonstrated by the compliance requirements of OFCCP. The regulations promulgated by the OFCCP require a federal contractor to

[21] Since the action undertaken by Kaiser and other government contractors such as the members of GCEA was predicated on regulations issued pursuant to Executive Order 11246, any relief which is granted should be prospective only. *City of Los Angeles* v. *Manhart*, ____ U.S. ____, 46 U.S.L.W. 4347 (1978).

make a written work force analysis and develop a written affirmative action compliance program for each establishment.[22] If this utilization analysis shows that a particular employer has "underutilizations" of available minorities or women, (an "affected class"), it must develop "goals and timetables" to overcome the underutilization in the particular work group.[23] The statistical imbalances that trigger affirmative action goals and timetable requirements are not dependent upon a showing of past or present discrimination.[24] Nor does the establishment of the quota aid any identified victim of past discrimination. Yet, without any showing of past discrimination whatsoever, a federal contractor who fails to comply with the above OFCCP regulations faces the sanctions of the cancellation or termination of all federal contracts, the withholding of progress payments on a particular contract, or debarment from all future federal contracts prior to a hearing.[25] By requiring employers to adopt affirmative action programs on the basis of numerical imbalance alone, without regard to the cause of such imbalance, and then by threatening to cut off federal contracts if the imbalance is not corrected, the OFCCP has turned "goals and timetables" into quotas.[26]

[22] Revised Order Number 4, 41 C.F.R. Part 60-2.

[23] 41 C.F.R. §§ 60-2.10, 60-2.12.

[24] Hearings on § 2115, etc., before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92nd Congress, 1st Session, 77, 88 (1971).

[25] 41 C.F.R. § 60-1.26; 41 C.F.R. § 60-2.2(b); 41 C.F.R. § 60-30. *See Crown Zellerbach Corp.* v. *Marshall*, 15 FEP Cases 1628 (E.D. La 1977); *Illinois Tool Works* v. *Marshall*, 17 FEP Cases 520 (N.D. Ill. 1978), as illustrative of the government's widespread practice of imposing the above sanctions prior to a hearing.

[26] The OFCCP's requirement that an employer establish goals and timetables without being afforded an opportunity to demonstrate that any imbalance existing in his workforce is not the result of acts of discrimination is inconsistent with the Court's decisions in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), *Furnco Construction Company* v. *Waters* ____ U.S. ____, 98 S. Ct. 2943 (1978), and *Board of Trustees of Keene State College* v. *Sweeney*, ____U.S.____, No. 77-1792, decided November 13, 1978.

The rigidity of the government's position that goals and timetables equal quotas is demonstrated by its position in support of District Judge Alfonso J. Zirpoli's order in *Legal Aid Society of Alameda County* v. *Brennan,* 381 F. Supp. 125 (N.D. Cal. 1974).[27] There the court directed that annual hiring and promotion rates, stated as percentages, *must* be equal to the percentage of minorities available in the relevant labor market. Although *Alameda* is currently on appeal by the intervenor, Chamber of Commerce of the United States of America, the government having withdrawn its appeal, continues to use Judge Zirpoli's decision to effect enforcement of quotas. *See eg., Crown Zellerbach Corp.* v. *Marshall,* 15 FEP Cases 1628 (E.D. La. 1977).

2. The Establishment of Racial Quotas Is Violative of Title VII and Requires Inconsistent Behavior By Employers.

The preferential treatment accorded minorities pursuant to the labor agreement between Kaiser and the union, based upon preceived OFCCP requirements, is clearly contrary to the congressional intent underlying adoption of Title VII.[28] The blatant inconsistencies between demands under Title VII and Executive Order 11246 are evidenced by the following statement of the floor managers of the bill during the debates in the United States Senate in enacting Title VII:

> There is no requirement in Title VII that an employer maintain a racial balance in his work force. On the contrary, any deliberate intent to maintain a racial balance, whatever such balance may be, would involve a violation of Title VII because maintaining such a balance would require an employer to hire or refuse to hire on the basis of race.[29]

The Congressional intent in enacting Title VII was to protect all individuals.[30] That the Act's protection extends to all persons regardless of race, was confirmed by the Court in *McDonald* v. *Santa Fe Trail Transportation Company,* 427 U.S. 273 (1976).

Employers receiving government contracts who resist pressures to implement numerical goals or quotas in order to comply with Title VII invite discrimination suits and will either have to bear the expense of defense or the stigma and expense of an admission of discrimination. In many cases employers face a massive, if not insurmountable, burden to justify their selection practices if they are seen as barriers to employment of minorities, even though there is no basis for questioning their good faith. Moreover, such reluctance subjects employers to sanctions under Executive Order 11246 including debarment from all future federal contracts. As the court of appeals correctly found, the establishment of a racial quota under the auspices of Executive Order 11246 creates reverse discrimination and is flatly prohibited by Title VII.

Yet, if employers disregard the clear mandate of Title VII and implement goals or quotas, as in the present case, they are faced with claims of "reverse discrimination" and are equally subject to the burdens of back pay and other government sanctions.

Meaningful affirmative action can be accomplished without usurping the rights of non-minority workers and

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[27] In *Alameda* the court mandated the OFFCP to follow "Technical Guidance Memo No. 1 on Revised Order No. 4", which was intended to be a guide in determining when the failure to meet a goal constitutes a violation of the contractor's obligations.

[28] Note, *Title VII and Preferential Treatment: The Compliance Dilemma,* 7 Texas Tech Law Review 671, 673 (1976).

[29] Interpretive memorandum of Title VII of HR 7152 submitted jointly by Senators Clark and Case, floor managers, 119 Congressional Record 7212, 7213 (1964).

[30] Remarks of Rep. Seller, 110 Congressional Record 2579 (1964).

running afoul of Title VII. Although the Executive Order requires affirmative action, it does not require quotas. Indeed, a requirement of racial quotas to correct an imbalance in a work force imposes an unreasonable burden on the employer and upon qualified majority workers who are denied employment benefits because they are not members of a racial minority. It also contributes to racial tensions. As Judge Wisdom in the present case pointed out:

> The employer and the union are made to walk a high tightrope without a net beneath them. On one side lies the possibility of liability to minorities in private actions, federal pattern and practice suits, and sanctions under Executive Order 11246. On the other side is the threat of private suits by white employees and, potentially, federal actions. If the privately imposed remedy is either excessive or inadequate, the defendants are liable. Their good faith in attempting to comply with the law will not save them from liability, including liability for back pay. (citations omitted).[31]

The resolution of the conflict between Title VII and the regulations promulgated under Executive Order 11246 is imperative to implement the Congressional mandate for a unified national policy of equal employment opportunity.

B. The Request By The Government For Remand Is An Attempt To Avoid The Resolution Of The Conflict Between Title VII And The Regulations Promulgated Under Executive Order 11246.

The interpretation by the government of Executive Order 11246 is in direct conflict with Title VII. Yet the government in its Petition for Certiorari is asking the Court to avoid this issue and instead remand to the district court to determine among other things, if the "facts with respect to the craft jobs at the Gramercy plant could have supported a *prima facie* finding of discrimination by the employer or the union and employer

[31] 563 F.2d at 230 (dissenting opinion).

together."[32] This is a blatant attempt by the government to avoid the illegal consequences of its interpretation of Executive Order 11246.[33]

The government had ample opportunity to establish its position in the courts below. It should not be allowed at this stage to overturn the findings of both the district court and the court of appeals that no past discrimination existed at the Gramercy plant of Kaiser. The "two-court" rule of the Court established in *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271 (1949), forbids a reconsideration of concurrent factual determination "by two courts below in the absence of a very obvious and exceptional showing of error".[34] The record is clear that no such error exists in the present case.

The issue before the Court is purely a legal question. Can racial quotas be imposed, not to remedy past discrimination by an employer, or to assist identifiable victims of past discrimination, but rather to achieve a designated ratio of minority employees presumed to have been disadvantaged, at the expense of innocent white workers? The thinly-veiled attempt by the government to avoid the resolution of this question by asking for remand should be denied.

III. The Conflict Within The Circuit Courts of Appeals Requires The Resolution of The Issue Presented.

The Fifth Circuit Court of Appeals in the present case properly found that attempts to distinguish numerical goals from quotas are illusory.[35] It went on to hold that "if Executive

[32] Petition for a Writ of Certiorari of the Government, No. 78-436 at 14.

[33] See Brief of Respondent in Opposition for a Writ of Certiorari.

[34] 336 U.S. at 275.

[35] 563 F.2d at 222.

Order 11246 mandates a racial quota for admission to on-the-job training by Kaiser in the absence of any prior hiring or promotion discrimination the Executive Order must fall before this direct congressional prohibition". 563 F.2d at 227. In so holding, it is clear that the court of appeals would require a finding of discrimination by an employer before racial quotas can be instituted. The correctness of this position is evident in that no remedy can be imposed in the absence of a violation. Yet the decision of the Fifth Circuit is in conflict with the decisions of *Associated General Contractors of Massachusetts, Inc.* v. *Atlschuler,* 490 F.2d 9 (1st Cir. 1973), *cert. denied* 416 U.S. 957 (1974), *Southern Illinois Builders Associations* v. *Ogilvie,* 471 F.2d 680 (7th Cir. 1972), and *Contractors Association of Eastern Pennsylvania* v. *Schultz,* 442 F.2d 159 (3d Cir.), *cert. denied,* 404 U.S. 854 (1971). In the First, Third, and Seventh Circuits an employer need not be found to have discriminated before racial quotas can be imposed. This conflict between the circuits on the appropriate scope of racial quotas absent a finding of discrimination by an employer must be resolved.

Moreover, there is conflict within the circuits concerning the breadth of a remedy which includes race conscious selection procedures. The Fifth Circuit below found that remedial quotas can be imposed only to aid identifiable victims of discrimination.[36] In the Third Circuit, racial quotas as remedies can be imposed to benefit classes of persons.[37] The resolution of the conflicts between the Fifth Circuit Court of Appeals and other courts of appeal is necessary in order to allow for uniform employment practices by companies, like Kaiser and members of GCEA, which operate nationwide.

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[36] 563 F.2d at 225.

[37] *EEOC* v. *AT&T,* 556 F.2d 167 (3d Cir. 1977), *cert. denied,* 46 U.S.L.W. 3803 (1978).

CONCLUSION

The dilemma facing government contractors under the current state of equal employment opportunity law is critical. Employers cannot simultaneously comply with Title VII and the regulations promulgated under Executive Order 11246. Whichever path an employer chooses he is left with potential liability to minorities, non-minorities and/or government agencies. This is an untenable position and the resolution of this conflict by the Court is essential.

For the reasons stated above the Government Contract Employers Association respectfully urges the Court to grant the petitions herein and issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfullly submitted,

GERARD C. SMETANA
Rooks, Pitts, Fullagar and Poust
Suite 1776
208 South LaSalle Street
Chicago, Illinois 60604

Attorney for *Amicus Curiae*
Government Contract Employers
Association

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